

## **REMARKS**

### **I. INTRODUCTION**

Favorable reconsideration of this application, in light of following discussion, is respectfully requested.

### **II. STATUS OF THE CLAIMS**

Claims 39-46 are pending. Claims 1-38 were previously cancelled without prejudice or disclaimer. No claims are newly added, amended, or cancelled herewith.

### **III. SUMMARY OF THE OFFICE ACTION**

In the Office Action, Claims 39, 40, and 43 were rejected as clearly anticipated by *McGraw et al.* (U.S. Patent No. 6,393,328, hereafter *McGraw*). Claims 39-42 and 45-46 were rejected under 35 U.S.C. § 102(b) as being anticipated by *Keegan, Jr.* (U.S. Patent No. 3,083,712, hereafter *Keegan*). Claims 39-42 were also rejected under 35 U.S.C. § 102 as anticipated *Aleev et al.* (U.S. Patent No. 4,165,750, hereafter *Aleev*). Additionally, Claims 39-42 were rejected as anticipated by *Cywinski* (U.S. Patent No. 5,350,415). Claim 43 was rejected under 35 U.S.C. § 103 as unpatentable over *Keegan*. Finally, Claims 39, 43, and 44 were rejected under 35 U.S.C. § 103 as unpatentable over *Reiss* (U.S. Patent No. 5,324,317) in view of *Keegan*.

### **IV. ARGUMENTS**

#### **A. Claims 39, 40, and 43 Patentably Distinguish Over *McGraw*, and the Office Action Has Not Provided Any Analysis to the Contrary**

Independent Claim 39, from which Claims 40 and 43 depend, recites, in part, that “the electrical stimulation is adapted to mimic a sequencing of at least two muscle groups proximate to the body segment and is sufficient to achieve visible and forceful contraction of the at least two muscle groups.”

As described in the specification, for example, at pages 4-5, electrodes 404 promote electrical stimulation of the surrounding musculature of the joint 402 of the respective body segment 400. The electrodes 404 may be placed at predetermined locations to mimic the natural movement pattern of the affected joint 402. According to the claimed invention, it is possible to mimic a natural functioning of the affected joint without the wear and tear commonly associated with physical activity.

*McGraw* does not disclose or suggest that “the electrical stimulation is adapted to mimic a sequencing of at least two muscle groups proximate to the body segment and is sufficient to achieve forceful contraction of the at least two muscle groups.” As the Office Action has not provided any reasoning or cited to any support in *McGraw* to show that this feature is disclosed therein, it is respectfully submitted that the outstanding Office Action has failed to provide a *prima facie* case of anticipation.<sup>1</sup> It is therefore respectfully requested that this rejection be withdrawn.

**B. Claims 39-43 and 45-46 Are Not Anticipated or Rendered Obvious by *Keegan***

As noted above, independent Claim 39, from which Claims 40-43, 45, and 46 depend, recites, in part, that “the electrical stimulation is adapted to mimic a sequencing of at least two muscle groups proximate to the body segment and is sufficient to achieve visible and forceful contraction of the at least two muscle groups.”

At pages 2-3, the Office Action states, with reference to *Keegan*, that “Examiner considers such sequential programming ‘to mimic a sequencing of at least two muscle groups proximate to the body segment’ since such stimulation sequence includes a proper time relation

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<sup>1</sup> Because the Office Action has provided no legal or factual basis to support this rejection, it is respectfully submitted that the next Office Action cannot properly be made final.

required for normal function of the muscles.” However, there is nothing in *Keegan* that supports this conclusion. Accordingly, it is respectfully requested that this rejection be withdrawn.

**C. Claims 39-42 Patentably Distinguish Over *Aleev***

As previously explained, independent Claim 39, from which Claims 40-42 depend, recites, in part, that “the electrical stimulation is adapted to mimic a sequencing of at least two muscle groups proximate to the body segment and is sufficient to achieve visible and forceful contraction of the at least two muscle groups.”

Like the other applied references, *Aleev* does not disclose or suggest this claimed feature. In fact, the outstanding Office Action admits at page 3 that *Aleev* does not disclose or suggest “sequencing at least two muscle groups proximate to the body segment ....” Rather, the Office Action relies upon an unsubstantiated conclusion that *Aleev* satisfies this claimed feature. An unsubstantiated conclusion does not provide a *prima facie* case of anticipation. Therefore, it is respectfully requested that this rejection be withdrawn.

**D. Claims 39-42 Also Patentably Distinguish Over *Cywinski***

As previously explained, independent Claim 39, from which Claims 40-42 depend, recites, in part, that “the electrical stimulation is adapted to mimic a sequencing of at least two muscle groups proximate to the body segment and is sufficient to achieve visible and forceful contraction of the at least two muscle groups.”

*Cywinski* suffers from the same defects noted above with the other applied references – it does not disclose or suggest this claimed feature. Accordingly, it is respectfully requested that this rejection be withdrawn.

**E. Claims 39, 43, and 44 Are Not Obvious Over the Combination of *Reiss* and *Keegan***

As previously explained, independent Claim 39, from which Claims 43 and 44 depend, recites, in part, that “the electrical stimulation is adapted to mimic a sequencing of at least two muscle groups proximate to the body segment and is sufficient to achieve visible and forceful contraction of the at least two muscle groups.”

The outstanding Office Action admits, at page 6, that *Reiss* does not disclose or suggest this feature. The Office Action attempts to remedy this deficiency by relying upon *Keegan*. However, as noted above, there is no teaching in *Keegan* of “the electrical stimulation is adapted to mimic a sequencing of at least two muscle groups proximate to the body segment and is sufficient to achieve visible and forceful contraction of the at least two muscle groups.”

Moreover, it is respectfully submitted that the applied combination of *Reiss* and *Cywinski* is nothing more than the result of improperly applied hindsight reconstruction in view of the present specification. As the Supreme Court recently reiterated:

As is clear from cases such as *Adams*, a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.

*KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007).<sup>2</sup> Moreover, “A factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning.” *Id.* at 1742.

In this case, even assuming, *arguendo*, that the claimed elements were independently known, there is no support in the references for the applied combination. Rather, the Office Action provides no explanation of the basis of the combination. Certainly, there is no citation to

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<sup>2</sup> As noted above, it is respectfully submitted that the applied references do not teach all of the features of independent Claims 1 and 8.

anything in the art that would provide the requisite motivation to combine the references. As a result, it is evident that the outstanding Office Action has engaged in exactly the type of hindsight reconstruction that the Supreme Court has cautioned against.

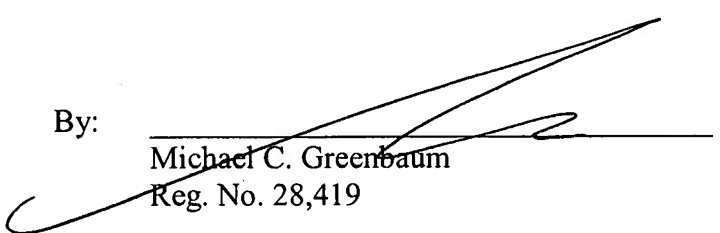
Accordingly, as the combination of *Reiss* and *Cywinski* is the result of impermissible hindsight reconstruction and fails to disclose or suggest the features of independent Claim 39, from which Claims 43 and 44 depend, it is respectfully submitted that the outstanding Office Action has failed to provide a *prima facie* case of obviousness. It is therefore respectfully requested that this rejection be withdrawn.

**V. CONCLUSION**

Consequently, in view of the foregoing discussion, it is respectfully submitted that this application is in condition for allowance. An early and favorable action is therefore respectfully requested.

Respectfully submitted,

By:



Michael C. Greenbaum  
Reg. No. 28,419

600 New Hampshire Ave., N.W.  
Washington, D.C. 20037  
Telephone: (202) 772-5800  
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